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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C.,
Petitioner,

vs.

DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in a suit brought to vindicate the constitutional rights of a religious movement, the religion clauses of the First Amendment bar the judiciary from ascribing "managing agent" status to — and therefore compelling the deposition of — the founder of the religion, who presently holds no church office and is uninvolved in church administration, based on a judicial inquiry into the "spiritual preeminence" of the founder and the "structure of belief" of his religion?

2. Whether the religion clauses of the First Amendment bar the judiciary from explicitly placing a "greater burden" on a religious organization than on a secular organization to prove that its founder, no longer actively involved in its day-to-day operations, is not a "managing agent" within the meaning of Rules 30(b) and 37(d), Federal Rules of Civil Procedure?

3. Whether a person who presently exercises no authority in an organization's affairs may be held a "managing agent" — and therefore may be compelled to give a deposition — on the grounds that there is a "possibility" that he "might" later exercise such authority?

4. Whether the religion clauses of the First Amendment required the court to impose a sanction less severe than dismissal against a church plaintiff which was unable to produce the founder of its religion as a purported "managing agent," where the only basis for having found the founder to be a "managing agent" was because of his spiritual leadership of the church and his potential for reasserting actual control?

PARTIES TO PROCEEDING BELOW

The conditionally certified plaintiff class appearing in the district court and the District of Columbia Circuit consisted of the following named Churches of Scientology:

Founding Church of Scientology of Washington, D.C.; Church of Scientology Advanced Organization of Los Angeles; Church of Scientology American Saint Hill Organization; Church of Scientology of Ann Arbor; Church of Scientology of Arizona; Church of Scientology of Boston; Church of Scientology of Buffalo; Church of Scientology of California; Church of Scientology Celebrity Centre International; Church of Scientology Celebrity Centre Las Vegas; Church of Scientology Celebrity Centre New York; Church of Scientology Celebrity Centre of Washington, D.C.; Church of Scientology of Central Ohio; Church of Scientology of Colorado; Church of Scientology Flag Service Organization; Church of Scientology of Florida; Church of Scientology of Hawaii; Church of Scientology of Illinois; Church of Scientology International; Church of Scientology of Kansas City; Church of Scientology of Long Island; Church of Scientology of Los Angeles; Church of Scientology of Michigan; Church of Scientology of Minnesota; Church of Scientology of Missouri; Church of Scientology of Nevada; Church of Scientology of New Haven; Church of Scientology of New Mexico; Church of Scientology of New York; Church of Scientology of Ohio; Church of Scientology of Orange County; Church of Scientology of Orlando; Church of Scientology Pasadena; Church of Scientology of Pennsylvania;

Church of Scientology of Portland; Church of Scientology of Sacramento; Church of Scientology of San Diego; Church of Scientology San Fernando Valley; Church of Scientology of San Francisco; Church of Scientology of San Jose; Church of Scientology Santa Barbara; Church of Scientology of Tampa; Church of Scientology of Texas; Church of Scientology of Washington State; Church of Scientology Western United States; Church of Scientology Mission of Adams Avenue; Church of Scientology Mission of Atlanta; Church of Scientology Mission of Bellevue; Church of Scientology Mission of Berkeley; Church of Scientology Mission of Boise; Church of Scientology Mission of Boulder; Church of Scientology Mission of Buena Ventura; Church of Scientology Mission of Cambridge; Church of Scientology Mission of Champaign/Urbana; Church of Scientology Mission of Cleveland; Church of Scientology Mission of Collingswood; Church of Scientology Mission of Concord; Church of Scientology Mission of Coral Gables; Church of Scientology Mission of Davis; Church of Scientology Mission of Denver; Church of Scientology Mission of Flagstaff; Church of Scientology Mission of Fort Lauderdale; Church of Scientology Mission of Fremont; Church of Scientology Mission of Fresno; Church of Scientology Mission of Genesee; Church of Scientology Mission of Glendale; Church of Scientology Mission of Highland Park; Church of Scientology Mission of Honolulu; Church of Scientology Mission of Houston; Church of Scientology Mission of Lakewood; Church of Scientology Mission of Los Gatos; Church of Scientology Mission of Manchester; Church of

Scientology Mission of Marin; Church of Scientology Mission of Meckenburg County; Church of Scientology Mission of Milwaukee; Church of Scientology Mission of Monterey-Carmel; Church of Scientology Mission of Mountain View; Church of Scientology Mission of Napa; Church of Scientology Mission of New York; Church of Scientology Mission of Palo Alto; Church of Scientology Mission of Peoria; Church of Scientology Mission of Phoenix; Church of Scientology Mission of Portland; Church of Scientology Mission of Redondo Beach; Church of Scientology Mission of Reno; Church of Scientology Mission of Richardson; Church of Scientology Mission of Rochester; Church of Scientology Mission of Sacramento; Church of Scientology Mission of Salinas; Church of Scientology Mission of Salt Lake City; Church of Scientology Mission of San Antonio; Church of Scientology Mission of San Francisco; Church of Scientology Mission of San Joaquin; Church of Scientology Mission of Santa Cruz; Church of Scientology Mission of Seattle; Church of Scientology Mission of Sheridan; Church of Scientology Mission of Silverlake; Church of Scientology Mission of South Bay; Church of Scientology Mission of South Denver; Church of Scientology Mission of South San Jose; Church of Scientology Mission of Southwest; Church of Scientology Mission of Sunnyslope; Church of Scientology Mission of University Way; Church of Scientology Mission Westwood.

Respondents herein in their official capacities were defendants below as follows:

Attorney General of the United States; Director of the United States Central Intelligence Agency; Chief of the United States National Central Bureau of the International Criminal Police Organization (INTERPOL); Director of the United States National Security Agency; Secretary of the United States Army; Postmaster General of the United States; Secretary of the Department of Treasury of the United States and Director, Federal Bureau of Investigation.

Petitioner Founding Church of Scientology has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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No. _____

IN THE

Supreme Court of the United States

October Term 1986

FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C.,
Petitioner,

vs.

DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI

The Founding Church of Scientology of Washington, D.C., on its own behalf and on behalf of a conditionally certified class of all Churches of Scientology in the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on September 16, 1986.

OPINIONS BELOW

The opinion of the court of appeals (App. 12a) is reported at 802 F.2d 1448. The court of appeals' orders denying the petition for rehearing (App. 36a) and suggestion of rehearing *en banc* (App. 37a) are not reported. The orders of the district court requiring

petitioner to produce L. Ron Hubbard for deposition (App. 5a, 8a), and dismissing the action for failure to produce him (App. 11a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. 12a) was entered on September 26, 1986. A timely petition for rehearing was denied on December 30, 1986. On March 27, 1987, Chief Justice Rehnquist extended the time for filing this petition to and including April 29, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions, the relevant texts of which are set forth in the Appendix (App. 2a), are involved: The First Amendment to the Constitution of the United States; Federal Rules of Civil Procedure 30, 32, 37.

STATEMENT

On January 23, 1978, petitioner (the church), on behalf of itself and a class of all churches and missions of the religion of Scientology in the United States,[1] filed suit against

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[1] One hundred and four individual Churches of Scientology in the United States were identified as potential class members. The district court did not formally rule on class certification, but conditionally certified the class to permit pre-trial discovery to proceed. *Founding Church of Scientology of Washington, D.C. v. Director, Federal Bureau of Investigation, et al.*, 459 F.Supp. 748, 754 (D.D.C. 1978).

respondents, eight government agencies, alleging a pattern of unlawful and unconstitutional acts. Petitioner sought declaratory and injunctive relief against respondent's unlawful conduct, including physical and electronic surveillance, use of informants and infiltrators, mail surveillance and mail openings, dissemination of information about the churches and their members for no lawful purpose, and maintaining the churches on a list of ideological and activist organizations for purposes of government monitoring and harassment. On October 19, 1978, the district court denied the government's motion to dismiss, finding that it had jurisdiction to determine the claims for injunctive and declaratory relief under 28 U.S.C. § 1331 and that the complaint adequately stated a claim for relief. *Founding Church of Scientology v. Director, F.B.I.*, 459 F.Supp. 748 (D.D.C. 1978).

On March 3, 1981, respondents moved to amend their answer to raise the affirmative defense of "unclean hands" on the ground that 11 individual Scientologists had been convicted of a criminal conspiracy. In the face of petitioner's objection that such a defense is inapplicable as a matter of law in an action to vindicate the constitutional rights of the plaintiff class of churches and their members, the district court permitted discovery as to the defense but postponed ruling on whether the defense would be available to the government. On August 21, 1984, respondents noticed the deposition of L. Ron Hubbard as "an officer, director, or managing agent of plaintiffs" and of 233 other persons.[2]

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[2] The government made no effort to subpoena Mr. Hubbard as a witness.

Upon the church's motion, the district court ruled that respondents' unclean hands discovery requests were "unmanageable and oppressive," and ordered respondents to submit a factual proffer as to why Mr. Hubbard's deposition was necessary.[3] After respondents did so, Mr. Hubbard did not appear on the designated deposition date of November 19, 1984.

Thereafter, respondents moved to compel or in the alternative to dismiss pursuant to Rule 37 and submitted declarations of hostile former church members alleging that Mr. Hubbard played a large role in church affairs during the period prior to 1982. In opposition to the government's motion, the churches submitted numerous declarations of the highest church officers attesting that Mr. Hubbard held no church offices and exercised none of the functions of a managing agent after 1982, and that, indeed, the churches had no capability of contacting him. Uncontroverted affidavits were filed by members of the boards of directors of each of the conditionally certified class member churches stating that Mr. Hubbard was not an officer or director of the individual church, that Mr. Hubbard had no legal authority over the individual church and that it had no ability to compel his appearance at deposition.

In a March 13, 1985 order (App. 5a), the district court, without holding a hearing and solely on the basis of the aforesaid declarations, found that respondents had established "at least a prima facie case" that Mr. Hubbard was a managing agent as of November 9, 1984, and ordered him to appear on April 5, 1985, for a limited purpose deposition

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[3] The government's request was so overreaching and arbitrary that it included requests to depose a person long since deceased and to depose a ship.

addressed to "the issue of his relationship to the organization." (App. 6a) The court denied the churches' motion to reconsider that order, and on April 9, 1985, after Mr. Hubbard failed to appear for the limited-purpose deposition, the court dismissed the complaint with prejudice (App. 11a).

Petitioner appealed the district court's decision on the grounds, *inter alia*, that the churches' evidence that Mr. Hubbard was not a managing agent *after* 1982 was unrebutted; that the district court had improperly rested its decision on an inquiry into the beliefs of a religion and the spiritual authority of the religion's founder; and that dismissal of the constitutional claims of an entire organized religion was a constitutionally excessive sanction for the failure of Mr. Hubbard to appear for a limited purpose deposition.

The Court of Appeals for the District of Columbia Circuit affirmed the dismissal. The court of appeals acknowledged that respondents' declarations regarding Mr. Hubbard's alleged role in church administrative affairs were based on pre-1982 factual assertions — not on evidence of his relationship to the church in November of 1984 when his deposition was noticed and April of 1985 when his deposition was scheduled. The court further acknowledged that "Hubbard may have sought to distance himself, for whatever reason, from the administrative details and to separate his personal business affairs from the Scientology apparatus." 802 F.2d at 1456 (App. 29a).

The court of appeals nevertheless rested its decision on two key factors: (1) there was a factual "*possibility* that Hubbard *might* unilaterally reassert his authority"; and (2) "Hubbard retained preeminence as *spiritual*" leader in accordance with the "*basic structure of belief*" of the

religion (emphasis added). 802 F.2d at 1456 (App. 29a). The court acknowledged that it was placing a "greater burden" on the founder of a religion who "wished to dissociate himself" from church organizations than is placed on "the founder of a business enterprise." 802 F.2d at 1457 (App. 30a). The court reasoned that:

> Hubbard's status - as founder and spiritual leader of a movement that lays claim to the status of a religion - presents a unique situation in the application of traditional legal doctrines governing the relationship of individuals to organizations or associations with which they are or have been affiliated. While an entrepreneur might simply terminate all connections to the enterprise that he or she had founded, Hubbard's teachings catapulted him to the epicenter of Scientology attention and activity. During his lifetime, Hubbard remained an object of allegiance and veneration *even if he did not maintain regular communication with the organizational vessel.*

802 F. 2d at 1457 (App. 30a) (emphasis added).

Under these circumstances, the court held that Mr. Hubbard was a managing agent of the class at the time the deposition was noticed. 802 F.2d at 1457 (App. 30a).

On the dismissal issue, the court of appeals recognized this Court's rule enunciated in *Societe Internationale v. Rogers*, 357 U.S. 197, 212 (1958), that dismissal must be based upon willfulness, bad faith or fault of the plaintiff. 802 F.2d at 1458 (App. 32a). The court held, however, that since the Churches of Scientology were Mr. Hubbard's alter ego by virtue of his *spiritual role* in the religion, notice to the corporate plaintiff could reasonably be construed as notice to him. It therefore found that his absence at the

noticed deposition adequately supplied the required element of willfulness or conscious disregard for the discovery process permitting the sanction of dismissal against the churches. 802 F.2d at 1458 (App. 33a).

The court further justified dismissal of this case as a deterrent "to other parties and potential parties in other cases who might otherwise contemplate abusive actions" and though harsh, within the discretionary authority of the trial court. 802 F.2d at 1458 (App. 32a).

On December 30, 1986, the court of appeals denied petitioner's motion for rehearing and suggestion of rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Unconstitutionally Intrudes on the Freedom of Churches to Decide Matters of Church Governance and Belief.

The court of appeals' decision, in ascribing managing agent status to the founder and spiritual leader of a religion, rests explicitly and candidly on a judicial inquiry into the "structure of belief" of the religion and the "spiritual" influence of the founder — an inquiry which places a "greater burden" on founders of religious organizations than on founders of secular organizations.[4] Such an inquiry

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[4] The religious *bona fides* of Scientology are judicially recognized. *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C.Cir. 1969), *cert. denied*, 396 U.S. 963 (1969); *Peterson v. Church of Scientology of California*, Civ. No. 81-3259 CBM, slip op. (C.D. Cal. Feb 27, 1984); *Christofferson v. Church of Scientology of Portland*, 57 Or.App. 203, 644 P.2d 577 (1982), *review denied*, 293 Or.

runs squarely against cardinal principles of First Amendment jurisprudence: that courts may not adjudicate matters of internal ecclesiastical organization and belief; that the judiciary must apply rules of law that are *neutral* as between religious and secular organizations and between different religious organizations; and that the government may place a burden on religious free exercise only where there is a compelling state interest and where less restrictive means of serving that interest are absent.

Rule 37(b) of the Federal Rules of Civil Procedure authorizes sanctions, including dismissal, if a "managing agent of a party" fails to appear for a noticed deposition. The lower federal courts, including the court of appeals in this case, have uniformly held that a party is only obliged to produce for deposition persons who are managing agents on the date the deposition is scheduled — not former or retired managing agents.[5] The lower courts have also agreed that the proper test of managing agent status is whether the proposed deponent is "invested by the corporation with

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456, 650 P.2d 928 (1982), *cert. denied*, 459 U.S. 1206, (1983); *Church of The New Faith v. Commissioner for Payroll Tax*, 49 Austl. L.R. 65 (High Ct. of Austl. 1983); *Church of Scientology of California v. Commissioner*, 83 T.C. 381 (1984); *Graham v. Commissioner*, 83 T.C. 575 (1984); *Barr v. Weise*, 293 F.Supp. 7, 10 (S.D.N.Y. 1968).

[5] *See, e.g., Manning v. Mars, Ltd.*, No. 85-1271 (E.D.Pa., January 10, 1986); *Catapano v. Western Airlines, Inc.*, 105 F.R.D. 621 (E.D.N.Y. 1985); *Tietz v. Textron, Inc.*, 94 F.R.D. 638, 640 (E.D.Wis. 1982); *Mitchell v. American Tobacco Co.*, 33 F.R.D. 262 (M.D.Pa. 1963); *Frasier v. Twentieth Century-Fox*, 22 F.R.D. 194, 197 (D. Neb. 1958); *Wilkerson v. East Harbor Trading Corp.*, 16 F.R.D. 280 (S.D.N.Y. 1954); 4A *Moore's Federal Practice*, 30.15 at 30-42 (1984); see also *Atlantic Cape Fisheries v. Hartford Fire Insurance Co.*, 509 F.2d 577, 579 n.2 (1st Cir. 1975); *Bon Air Hotel, Inc. v. Time, Inc.*, 376 F.2d 118, 121 (5th Cir. 1967), *cert. denied*, 393 U.S. 815 (1968).

broad general powers to exercise judgment and discretion in corporate affairs" and whether he can be relied upon to provide testimony at the party's request.[6] In this case, the court of appeals acknowledged that respondents' evidence of Mr. Hubbard's role in church affairs applied only to the "earlier period" up to 1982; that the declarations of the highest corporate and ecclesiastical officers of the churches attested that Mr. Hubbard had no administrative or corporate authority when his depositions were scheduled in 1984 and 1985; and that the credibility of those declarations, which were unrebutted, could not be questioned by the court. 802 F.2d at 1455, n. 10 (App. 27a).

In order to find that Mr. Hubbard was in fact a managing agent on the relevant dates, the court of appeals therefore undertook an inquiry into the sources of scriptural authority of the churches, concluding that Mr. Hubbard's continued "spiritual preeminence" and the "structure of belief" of the religion made him the alter ego of the churches. 802 F.2d at 1456 (App. 29a). Such an inquiry subverts the fundamental principle "that religious freedom encompasses the power (of religious bodies) to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696,

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[6] *See e.g., Sugarhill Records, Ltd. v. Motown Record Corp.*, 105 F.R.D. 166 (S.D.N.Y. 1985); *Tomingas v. Douglas Aircraft, Inc.*, 45 F.R.D. 94, 96 (S.D.N.Y. 1968); *Berstein v. N.V. Nederlandsche-Americkaanche Stoomvaart-Maatschappij*, 15 F.R.D. 37, 38 (S.D.N.Y. 1953); *Schilling-Hillier, S.A.I.E.C. v. Virginia-Carolina Chemical Corp.*, 19 F.R.D. 271, 274 (S.D.N.Y. 1956); *Bon Air Hotel, Inc. v. Time, Inc.*, 376 F.2d 118, 121 (5th Cir. 1967), *cert. denied*, 393 U.S. 815 (1968), *Terry v. Modern Woodmen*, 57 F.R.D. 141, 143 (W.D.MO 1972).

721-22 (1976) (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)).

This Court has therefore pronounced that civil courts may not inquire at all into "matters of discipline, faith, *internal organization* or *ecclesiastical rule*, custom or law," particularly where, as here, the highest organs of the church have given uncontradicted declarations of the structure of church polity. *Serbian Eastern Orthodox Diocese, supra*, 426 U.S. at 713 (emphasis added); *see also, Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727-34 (1871). The boldness of the court of appeals' willingness to contradict church officials on a sensitive question of internal organization is compounded by the substance of the court's inquiry — that is, the court's independent assessment of the churches' belief systems and sources of scriptural authority.

The court of appeals' radical intrusion on the autonomy of church governance is hard to exaggerate. The court sweeps aside the unequivocal authority structure proclaimed by the highest church officers; and on the basis of an independent inquiry into *spiritual* influence and *religious* belief, the court designates an "alter ego" with the plenary powers of a shadow church government. Such direct judicial entanglement in the meaning of a founder's spiritual authority and in the reconstructing of a church's ecclesiastical hierarchy is far more egregious than the kinds of entanglement this Court has found unconstitutional — such as a judicial inquiry into a church's labor relations with employees, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979), or judicial designation of which parochial school courses are secular and which are religious. *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

The incongruity of the court of appeals' decision — equating spiritual preeminence with potential managerial

authority — is evident in the untoward implications for litigation involving not just relatively newer religions, such as petitioner's, but established religions as well. In this case, a suit brought by distinct corporate church entities was dismissed because their spiritual leader did not appear for deposition as managing agent. By precise analogy, the Pope, merely on the basis of being the spiritual leader of the Catholic church, may be designated managing agent and deposed on pain of dismissal of any lawsuit brought by any Catholic diocese.

II. The Court of Appeals' Decision Unconstitutionally Applies Standards for Determining Managing Agent Status That Are Not Neutral As Between Religious And Secular Organizations and Requires Courts to Make Determinations of Religious Doctrine.

The court of appeals candidly concedes that its ruling places a "greater burden" on the founder of a religious organization than the founder of a business enterprise. 802 F.2d at 1457 (App. 30a). Under the court's rule, even if a religious leader "wishe(s) to disassociate himself" from the church organization, and "even if he did not maintain regular communications with the organizational vessel," he will be unable to shed his status as managing agent. This ruling departs dramatically from this Court's mandate that the courts apply "neutral principles of law" in adjudicating internal church matters, relying "exclusively on objective, well-established concepts" that are "completely secular in operation." *Jones v. Wolf*, 443 U.S. 595, 602, 603 (1979). In this case, the court of appeals developed a novel test of managing agent status that explicitly applies different, more

burdensome standards to religious organizations than to secular organizations.

Application of the required neutral principles of the federal rules could not support a finding that Mr. Hubbard was the managing agent when no evidence existed in the record that he had *any* active role in *any* Church of Scientology for more than two years prior to the notice of deposition.

Nevertheless, the court of appeals reasoned that Mr. Hubbard was not able to shed a managing status in the manner of the founder of a business enterprise because his "teachings catapulted him to the epicenter of Scientology attention and activity" and he "remained an object of allegiance and veneration even if he did not maintain regular communication with the organizational vessel." 802 F.2d at 1457 (App. 30a). Thus, the court impermissibly found that because of Mr. Hubbard's unique position of spiritual authority, he in effect would be the managing agent of all churches of Scientology for his entire life.

In essence the organizational evaluation undertaken by the appeals court consisted not of looking to neutral principles of secular law, but rather of looking to the beliefs, practices and dogma of the religion of Scientology to determine Mr. Hubbard's influence by virtue of his authorship of church scriptures. Upon determining his spiritual role to be paramount, it reasoned that his corporate influence necessarily followed.

No court has the authority to undertake such an evaluation. The spiritual influence test established and utilized below plainly comprised a violation of fundamental constitutional provisions over which this Court should exercise review.

III. The Explicitly Heavier Burden That the Court of Appeals Imposed on Religious Organizations Is Not the Least Restrictive Means of Serving a Compelling Governmental Interest.

By not only distinguishing between religious and secular organizations but explicitly placing a heavier burden on the former, the decision below runs afoul of still another basic principle of religious freedom. Under the First Amendment, even indirect burdens on religious organizations are improper unless they are necessary to implement a compelling governmental interest, and, in addition, do so by the least burdensome means possible. *E.g., Hobbie v. Unemployment Appeals Commission of Florida*, __ U.S. __, 107 S.Ct. 1046 (1987); *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 716 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

The drafters of the Federal Rules of Civil Procedure, and the courts which have interpreted those rules, have set forth the well-established standards, discussed *supra*, defining managing agent status — standards deemed fully sufficient to fulfill the governmental interest in expeditious and effective pretrial discovery procedure. The court of appeals' decision gave no reason — and there is none — why those standards serve discovery interests less sufficiently in cases involving religious organizations than in cases involving secular organizations — let alone why the novel, extended definition of managing agent status devised below is the *necessary* and *least restrictive means* for conducting discovery against religious organizations.

The court of appeals' decision is even more pernicious in that it discriminates not only between religious organiza-

tions and secular organizations, but that it discriminates among and between religious organizations. Only those religious corporations which are affiliated with a religion having a living spiritual leader would be subject to the court of appeals' special burden. The court of appeal's test thus favors one religion over another making it violative of the mandate of strict neutrality between religions. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

The court of appeals' decision unconstitutionally burdens religious freedom in another respect — a burden that is felt deeply by the plaintiff class of churches and millions of adherents whose First Amendment rights are asserted in the underlying action. That is, the novel managing agent standard imposed on petitioner is, of course, the predicate for the district court's sanction of dismissal with prejudice. That dismissal forever deprives an entire organized religion and its worshipers of vindication of their rights to freedom from governmental harassment and abuse.[7] The severity of

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[7] The burden on petitioner's religious freedom is particularly inexcusable in the posture of this case: Mr. Hubbard failed to appear for a limited purpose deposition on the question of his relationship to the churches, not on the merits. The deposition was part of a discovery program aimed at establishing an "unclean hands" defense stemming from the conviction of 11 individuals. The district court had yet to rule on the merits of that defense, in the face of petitioner's objection that the action of 11 individuals - who were subsequently removed by the churches - could not conceivably deny the entire class of churches and millions of adherents the opportunity to vindicate their constitutional rights.

Further, the churches were held responsible for Mr. Hubbard's failure to appear, notwithstanding unrebutted evidence that they were unable to initiate communication with him. (The court of appeals noted that Mr. Hubbard, who was in seclusion, occasionally initiated communication, but not that petitioner was able to initiate communication with him. 802

the burden on petitioner's First Amendment rights exacerbates the constitutional infirmity of a novel managing agent standard that rests on no compelling governmental interest and no showing that it is the least restrictive means for fulfilling discovery interests.

Punishing petitioner with the ultimate judicial sanction of dismissal of its claims as a *deterrent* to other litigants, magnifies the constitutional infirmity of the court of appeals' new rule. A mechanical misapplication of *National Hockey League*[8] deterrent reasoning herein distort this Court's purpose in that case and manifests the failure of the

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F.2d 1450, 1455, (App. 16a, 26a). Thus, petitioner was put in the impossible position of producing Mr. Hubbard in order to prove, at his deposition, that petitioner was unable to produce him.

The panel made reference to a stipulation of evidence that was entered into in a criminal case between the United States Attorney and 9 individual Scientologists in October of 1979 in *United States v. Mary Sue Hubbard*, No. 78-401 (D.D.C.). The reference in the Stipulation of Evidence that Mr. Hubbard was the "founder and leader of Scientology" at that time in no way provides a basis for finding managing agent status 6 years later. Mr. Hubbard and the church were not even parties to such stipulation. Mr. Hubbard was neither convicted, indicted or even called as a witness in those proceedings. Had the government had any evidence linking Mr. Hubbard to the conspiracy he surely would have been indicted. The panel's conclusory assumption, that despite the lack of indictment or involvement, Mr. Hubbard was somehow connected with the conspiracy merely because he was the founder and purportedly the leader of Scientology is thus without the slightest evidentiary support, and certainly does not justify finding him a managing agent 6 years after the fact. Furthermore, the 9 defendants who were involved simply stipulated to what the government's case would be, and not to the truth of the alleged facts contained therein.

[8] *See, National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976).

court of appeals to apply the preferred standard applicable to petitioner's First Amendment claims.

IV. Ascribing Managing Agent Status to Persons Who Might Exercise Organizational Authority at a Future Date Radically Departs from Well-Established Rules of Discovery.

In addition to equating a religious founder's spiritual influence with his potential corporate church authority, the court of appeals' decision fashions a second new standard for determining managing agent status, applicable to both secular and religious organizations. The court of appeals ruled that a person may be compelled to give a deposition as an organization's managing agent if there is merely a "possibility" that he "might unilaterally reassert" his authority at some future time. This rule radically departs from the well-established holding of all other lower federal courts that have addressed the issue that managing agent status rests on the exercise of organizational authority at the time the deposition is scheduled. *See supra* at 9 .[9]

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[9] The court of appeals cites 3 district court cases as precedent for its new rule. *See Independent Productions Corp. v. Loew's Inc.*, 24 F.R.D. 19 (S.D.N.Y. 1959); *Fay v. United States*, 22 F.R.D. 28 (E.D.N.Y. 1958); *Curry v. States Marine Corp.*, 16 F.R.D. 376 (S.D.N.Y. 1954). Those cases in no way rest on the rule stated by the court of appeals. In *Independent Productions Corp., supra*, 24 F.R.D. at 26 n.9, the deponents — a former president and a former secretary-treasurer of a corporation — were held to be managing agents based on a finding that they in fact continued to participate in corporate affairs to a sufficient extent until the time of their depositions. In *Fay v. United States, supra*, 22 F.R.D. at 32-33, the court found that one who is *presently* serving as captain or chief officer of a vessel in fact fits the well-accepted definition of a managing agent, set forth *supra*. In *Curry v. States*

The court of appeals' new rule vastly expands the range of persons vulnerable to compulsory depositions as managing agents — and, accordingly, widens the room for tactical discovery maneuvering available to litigants. The variety of configurations in which a person, although presently uninvolved in organizational affairs, might potentially assert authority in the future is virtually limitless. In some situations, the potential for future exercise of authority rests on a person's legally identifiable status. For example, a controlling shareholder who is presently uninvolved in corporate affairs has the legal potential to assert and exercise authority at any time in the future. Likewise, a silent partner may be wholly divorced from the actual affairs of a partnership, but may retain the potential to exercise authority at a future date. In other situations, the potential for future exercise of authority may rest on less predictable, fact-based inquiries of the kind conducted by the court of appeals in this case.[10]

As discussed above, in order to find sufficient potential for Mr. Hubbard's future exercise of authority, the court of appeals launched an inquiry into the churches' sources of scriptural authority, their structure of belief, and their founder's spiritual influence. Wholly apart from the court's

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Marine, supra, 16 F.R.D. at 337 (emphasis added), the court found that a former master of a ship who is *presently* serving as chief mate at the time of the deposition is an "appropriate officer" within the meaning of "officers, director or managing agent" in the pertinent discovery rules.

[10] While most "established" religions were created by the vision of prophets or spiritual leaders now long dead, there are a number of "newer" religions which were organized in the past 40 years and whose founders are still alive. It requires little imagination to predict future applications of this onerous test to these organizations by both public and private litigants.

intrusion on religious freedom, such an inquiry constitutes an extremely speculative and *ad hoc* judicial exercise. The potential for litigants' tactical exploitation of such an open-ended inquiry in the discovery process is enormous.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: April 29, 1987

Respectfully submitted,

ERIC M. LIEBERMAN

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APPENDIX

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STATUTES INVOLVED

Federal Rules of Civil Procedure

Rule 30. Depositions Upon Oral Examination

* * *

(b) Notice of Examination: General Requirements; Special Notice; Non-Stenographic Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone

* * *

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

Rule 32. Use of Depositions in Court Proceedings

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

* * *

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

Rule 37. Failure to Make or Cooperate in Discovery: Sanctions

* * *

(b) Failure to Comply with Order.

* * *

(2) **Sanctions by Court in Which Action is Pending**. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

* * *

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof. . .

Constitutional Provisions

First Amendment to the United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .

Fifth Amendment to the United States Constitution

No person shall be . . . deprived of life, liberty, or property, without due process of law. . .

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C., INC.,
Plaintiff,
v.

DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, et al.,
Defendants.

FILED
MAR 13 1985
JAMES F. DAVEY,
Clerk
Civil Action No. 78-0107

ORDER

Before the Court is defendants' renewed motion to dismiss this action or in the alternative to compel the deposition of L. Ron Hubbard, plaintiff's opposition, and defendants' reply. This motion arises from plaintiff's refusal to produce L. Ron Hubbard for a deposition duly noticed for November 19, 1984. Plaintiff contends that defendants could not and cannot compel the appearance of Hubbard under the Federal Rules of Civil Procedure, in that, according to plaintiff, Hubbard was not on November 19, 1984, and is not now a "managing agent" of the Church of Scientology.[1]

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[1] Rule 32(a)(2) provides that:
"The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association which is a party may be used by an adverse party for any purpose."

In support of their motion, defendants submit numerous exhibits, including certain declarations which are the subject of pending motions to strike or seal filed by plaintiff. Even disregarding those declarations (but reserving decision on the motions to strike or seal), there is ample evidence in the record indicating that L. Ron Hubbard has been a managing agent of plaintiff in recent years and a dearth of support for the proposition that his role in the Church of Scientology has substantially changed since then. *See e.g.* Order of July 20, 1984, *Church of Scientology of California v. Gerald Armstrong*, No. C 420153 (Super. Ct. Cal. 1984); Order of September 24, 1984, *Church of Scientology of California v. Commissioner of Internal Revenue*, Dkt. No. 3352-78 (Tax Ct. 1984); Declaration of Diana Reisdorf-Voegeding; Declaration of John Nelson. On the strength of this evidence, and the entire record, defendants have made at least a prima facie showing that L. Ron Hubbard was a managing agent of the Church of Scientology on November 19, 1984, that from his position at the helm of the Church he directs and has directed the Church and its membership, and that he is uniquely situated to provide information bearing on defendants' allegation that plaintiff engaged in unclean hands conduct orchestrated by Hubbard during the years at issue in this lawsuit. His testimony is essential. Defendants shall therefore be permitted to depose Hubbard on the issue of his relationship to the organization. This limited-purpose deposition shall take place at the U.S. Department of Justice at a date and time to be arranged between counsel but in no event later than April 5, 1985. If, on the basis of Hubbard's responses to questions directed to his recent

activities with respect to the Church, the parties reach an agreement as to his alleged status as a managing agent, the deposition may proceed to other topics or adjourn, as appropriate. Should no such agreement be reached, the Court will decide the issue of whether Hubbard is or was on November 19, 1984 a managing agent of plaintiff, upon review of the deposition transcript which shall be supplied by defendants within five days of the deposition.

Failure of L. Ron Hubbard to appear for deposition as scheduled will result in dismissal of this cause pursuant to Federal Rule of Civil Procedure 37(d).

Telephonic communication of this Order has been provided counsel this date.

SO ORDERED this 13th day of March, 1985.

/s/ JOYCE HENS GREEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C., INC.,
Plaintiff,
v.

FILED
APR 4 1985
JAMES F. DAVEY,
Clerk
Civil Action No. 78-0107

DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, et al.,
Defendants.

ORDER

Before the Court is plaintiff's motion for reconsideration of the Order entered on March 13, 1985, defendants' opposition thereto, and plaintiff's reply. Upon careful reconsideration of that Order and review of the materials most recently submitted in this case, the Court finds no reason to vacate or to alter in any way its decision to dismiss this action should L. Ron Hubbard fail to appear for deposition by April 5, 1985. The sanction of dismissal is authorized under Federal Rules of Civil Procedure 37(d) and 37(b)(2)(C), and is fully justified in these circumstances. Moreover, Rule 37 does not require that an evidentiary hearing be held if the matter has been fully briefed. *See e.g. Loctite Corp. v. Fel-Pro, Inc.*, 667 F.2d 577, 583 n.6 (7th Cir. 1981).

As was stated in the March 13, 1985 Order, the testimony of L. Ron Hubbard is essential to the litigation of defendants' unclean hands defense, whatever the outside

boundaries of that defense may be. *See* March 13, 1985 Order at 2. Defendants have made at least a prima facie showing

> that L. Ron Hubbard was a managing agent of the Church of Scientology on November 19, 1984, that from his position at the helm of the Church he directs and has directed the Church and its membership, and that he is uniquely situated to provide information bearing on defendants' allegation that plaintiff engaged in unclean hands conduct orchestrated by Hubbard during the years at issue in this lawsuit,

id., and nothing raised or reargued in plaintiff's motion for reconsideration rebuts that showing. Taking into consideration all the evidence concerning plaintiff's claim of inability to contact Hubbard, the Court offered plaintiff a final opportunity to rebut defendants' showing of Hubbard's relationship with plaintiff by producing Hubbard for a limited purpose deposition directed to that issue no later than April 5, 1985. In light of defendants' strong prima facie showing, should Hubbard fail to appear for deposition within the prescribed time period, his nonattendance, whether due to recalcitrance or self-imposed seclusion, will be attributed to plaintiff and will supply the requisite "element of willfulness or conscious disregard" for the discovery process which justifies the sanction of dismissal. *See Dellums v. Powell*, 566 F.2d 231, 235 (D.C. Cir. 1977) ("Rule 37(b)(2) (C) recognizes that parties failing to comply with discovery requests may be estopped from "support[ing] or oppos[ing] designated claims or defenses.")

Accordingly, and in keeping with the Order of March 13, 1985, failure of L. Ron Hubbard to appear for deposition no later than April 5, 1985, will result in dismissal of this cause

pursuant to Federal Rule of Civil Procedure 37(d). The respective counsel are to advise the Court in writing, no later than April 9, 1985, whether Mr. L. Ron Hubbard did, or did not, timely appear for the above noted deposition.

This Order has been telephonically communicated to counsel this date.

SO ORDERED this 4th day of April, 1985.

/s/JOYCE HENS GREEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C., INC., et al.,
Plaintiffs,
v.

DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, et al.,
Defendants.

FILED
APR 9 1985
JAMES F. DAVEY,
Clerk
Civil Action No. 78-0107

ORDER

Pursuant to the Orders of March 13, 1985 and April 4, 1985, and in consideration of Defendants' Notice of L. Ron Hubbard's Failure to Appear for Deposition, it is, by the Court, this 9th day of April, 1985

ORDERED that this cause be, and it hereby is, dismissed with prejudice.

/s/ JOYCE HENS GREEN
United States District Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5885

FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C., INC., APPELLANT

v.

WILLIAM H. WEBSTER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION OF THE UNITED STATES, ET AL.

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 78-0107)

Argued June 3, 1986

Decided September 26, 1986

Anthony P. Bisceglie, with whom *William C. Walsh* and *Jeffrey B. O'Toole* were on the brief for appellant.

Freddi Lipstein, Attorney, Department of Justice, with whom *Richard K. Willard*, Assistant Attorney General, Department of Justice, *Joseph E. diGenova*, United States Attorney, and *Barbara L. Herwig*, Attorney, Department of Justice were on the brief for appellees. *Anthony J. Steinmeyer* and *E. Roy Hawkens*, Attorneys, Department of Justice also entered appearances for appellees.

Regina Jackson was on the brief for *amici curiae*, American Coalition of Unregistered Churches, et al., urging reversal.

Before: GINSBURG, STARR, and SILBERMAN, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* STARR.

STARR, *Circuit Judge*: The appeal before us marks the end of eight years of litigation in a case that has never passed beyond the stage of pre-trial discovery. The District Court dismissed the case as a sanction under Fed. R. Civ. P. 37 for failure to comply with a discovery order entered by the court. Specifically, L. Ron Hubbard, the founder of the Church of Scientology, failed to appear for a court-ordered deposition to inquire into his status as a managing agent of that organization. We are satisfied that the District Court acted lawfully within its authority and sound discretion. We therefore affirm.

I

In 1978, the Founding Church of Scientology of Washington, D.C. ("Scientology") filed suit on behalf of itself and a class composed of all "Churches" and "Missions" of Scientology in the United States. In its complaint, Scientology named the United States and numerous fed-

eral officials as defendants.[1] The complaint alleged an extensive campaign of government harassment that included illegal investigative and law enforcement activities, collection and dissemination of information about Scientology and other related organizations, and encouragement of hostility toward the movement inside and outside the federal government.

By virtue of this alleged unlawful activity, Scientology asserted violations of the First, Fourth and Ninth Amendments to the Constitution. It sought compensatory and punitive damages under the Federal Tort Claims Act; a declaratory judgment that the defendants' actions had violated the Constitution and laws of the United States; an injunction against further law enforcement activities by defendants directed at the various Scientology "Churches" and their members; and further injunctive relief to expunge or destroy false and derogatory information allegedly collected and obtained illegally by defendants and placed in government records.

In an initial opinion and order dated October 19, 1978, the District Court dismissed the damage claims for failure to exhaust administrative remedies under the Federal Tort Claims Act, and the claim for injunctive relief from asserted religiously based discrimination on the grounds that plaintiff had not pursued the exclusive remedy available under Title VII of the Civil Rights Act of 1964. The trial court allowed the remainder of

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[1] The other defendants, named in their official capacities, were the Director of the Federal Bureau of Investigation, the Attorney General of the United States, the Director of the Central Intelligence Agency, the Secretary of the Treasury, the Chief of the United States National Central Bureau of the International Criminal Police Organization, the Director of the National Security Agency, the Secretary of the Army and the Postmaster General. For convenience sake, the various defendants-appellees will frequently be referred to in our discussion as "the Government."

the suit to proceed and conditionally certified a class of all Scientology Churches and Missions for purposes of seeking declaratory and injunctive relief.

Subsequent developments in the case followed on the heels of a criminal prosecution, *United States v. Mary Sue Hubbard*, Crim. No. 78-401, slip op. (D.D.C. order enforcing plea agreement Oct. 8, 1979), brought against nine high ranking officials of the Church of Scientology. In that case, several defendants stipulated that the network of Scientology organizations had conducted a broad campaign against U.S. Government entities and officials, particularly the Internal Revenue Service.[2] This concerted campaign by the Scientology apparatus encompassed a wide range of illegal activities, including theft of government documents for use in litigation against the United States, falsification of government identification cards, wiretapping, infiltration and perjury.

On the basis of this new evidence, the defendants in the present case sought to amend their answer to the complaint in order to interpose a defense of "unclean hands." The United States Magistrate, in a decision affirmed by the District Court, permitted the defense to be raised and discovery to be conducted without deciding whether such a defense should in fact be applied in this case. We pause to observe that "unclean hands" as a defense went to the injunctive remedy, but not to the request for declaratory relief. As will be seen, however, the defendants contend on appeal that the discovery they sought extended beyond this defense to provide a general, substantive defense to the claims asserted in this suit.[3]

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[2] *See* Stipulation of Evidence filed Jan. 7, 1980 as Exhibit 1 to Memorandum of Facts and Activities in support of Defendants' Motion for Leave to Answer.

[3] The undisputed evidence of a campaign of criminal activity by the Church, the appellees argue, in fact justified the intensive law enforcement activities that the complaint

On August 21, 1984, as part of a series of discovery requests, the Government noticed the deposition of L. Ron Hubbard, the founder of the Church of Scientology, in his capacity as "an officer, director, or managing agent of plaintiffs." Joint Appendix ("J.A.") at 163. When Hubbard failed to appear for the deposition on the designated date, defendants moved to dismiss the suit or, in the alternative, to compel Hubbard's deposition. The court responded by ordering defendants to renotice the deposition and to submit a factual proffer as to why Hubbard's deposition was necessary. J.A. at 262. The court stated that if Hubbard did not appear, the Government could then renew its alternative motion to compel his deposition or dismiss the case. The defendants submitted the requested factual proffer and renoticed the deposition. Hubbard again failed to appear on the appointed date. In the wake of this turn of events, plaintiffs submitted numerous declarations by officials of the individual Scientology churches and high officials in the central Scientology organization denying not only Hubbard's status as managing agent but any capability of contacting him. J.A. at 271-350. The Government responded with additional declarations and other evidence in support of Hubbard's status as managing agent. J.A. at 351-407.

In an order issued March 13, 1985, the District Court found that the Government had established "at least a prima facie case" that Hubbard was managing agent as of November 19, 1984. To settle this issue conclusively, the court ordered Hubbard to appear on April 5, 1985, for a limited-purpose deposition addressed to "the issue of his relationship to the organization." J.A. at 429. No inquiry could be made into the facts pertaining to the merits of the suit. Failure to appear, the court expressly

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attacked. *See* Transcript of Oral Argument, June 3, 1986, at 18-28.

warned, would result in dismissal of the suit altogether. *Id.* Submitting several additional declarations by Church employees and officials, plaintiff moved for reconsideration. J.A. at 431-72. This the court denied. J.A. at 475. On April 9, 1985, upon notification by counsel that Hubbard had failed to appear for the limited-purpose deposition as scheduled, the court dismissed the case with prejudice. J.A. at 488. On July 10, the court denied the plaintiff's motion to vacate the judgment of dismissal. Scientology then filed this appeal.

II

The ultimate question for resolution is whether the District Court abused its discretion when it dismissed this suit as a discovery sanction under Fed. R. Civ. P. 37. Before we reach that issue, however, we must first determine whether the District Court properly resolved the underlying question whether the Government had shown, at least prima facie, that Hubbard was a managing agent of Scientology and could therefore be compelled to testify on its behalf.

A

Fed. R. Civ. P. 26(a) broadly authorizes parties to obtain discovery by various means, the first of which is "depositions upon oral examination." Depositions thus rank high in the hierarchy of pre-trial, truth-finding mechanisms. That is not surprising. Face-to-face confrontations prior to trial, with such indicia of formality as administration of the oath, the presence of counsel and stenographic recording of the proceedings, are a critical component of the tools of justice in civil litigation. Fed. R. Civ. P. 30(a) thus broadly provides that "any party may take the testimony of any person, including a party, by deposition upon oral examination." Fed. R. Civ. P. 32(a)(2), governing the use of depositions in court proceedings, provides that the deposition "of anyone who at the time of taking the deposition was an officer, director,

or *managing agent* . . . may be used by an adverse party for any purpose." (Emphasis added.) At the same time, Fed. R. Civ. P. 37(d) authorizes dismissal and other sanctions "[i]f a party or an officer, director or *managing agent* of a party . . . fails . . . to appear before the officer who is to take his deposition, after being served with a proper notice." (Emphasis added.) The concept of "managing agent" is thus an integral part of the corpus of discovery law. *See also* Fed. R. Civ. P. 30(b)(6).

Federal discovery provisions have traditionally provided a mechanism for an adverse party to secure depositions from a public or private corporation through a managing agent designated by the adverse party. In 1970, an amendment to the Federal Rules of Civil Procedure replaced a specific authorization for securing depositions of managing agents with the current, more general framework, and established a new mechanism permitting the corporation (or other entity) itself to designate managing agents to sit for depositions, *see* Fed. R. Civ. P. 30(b)(6). When the entity itself makes the designation, subsequent disputes over the adverse party's use of the deposition "for any purpose" are avoided. *See* Fed. R. Civ. P. 30, Advisory Comm. Note to Subdivision (b)(6), at 92 (1986). However, the language authorizing the new procedure expressly stated that it "does not preclude taking a deposition by any other procedure authorized in these rules." Fed. R. Civ. P. 30(b)(6). The Advisory Committee Note accompanying the Rule made clear that the new procedure does not supplant but "supplements the existing practice whereby the examining party designates the corporate official to be deposed." The former procedure, long known to the bar, thus remains available for litigants to employ if they see fit. *See Atlantic Cape Fisheries v. Hartford Fire Insurance Co.*, 509 F.2d 577, 578-79 (1st Cir. 1975); 8 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 2103, at 373-74 (1970). It was under this traditional procedure that the Government sought to depose Hubbard.

B

We pause at this stage of our analysis to observe that there is no doubt, and appellant indeed has not sought to dispute, that Scientology qualifies under the broad category of organizations which can be deposed through an adverse party's designation of a managing agent. Regardless of whether Scientology is a religious organization, a for-profit private enterprise, or something far more extraordinary—an intriguing question that this suit does not call upon us to examine—the entities to which the managing-agent concept can be applied include all manner of public and private corporations and associations, non-profit and otherwise. *See* 4A J. Moore, Moore's Federal Practice ¶ 30.51, at 30-41 (2d ed. 1984).

The law concerning who may properly be designated as a managing agent is sketchy.[4] Largely because of the vast variety of factual circumstances to which the concept must be applied, the standard, like so many others in the law, remains a functional one to be determined largely on a case-by-case basis. *See Petition of Manor Investment Co.*, 43 F.R.D. 299, 300 (S.D.N.Y. 1967); *Kolb v. A.H. Bull Steamship Co.*, 31 F.R.D. 252, 254 (S.D.N.Y. 1962). Nearly all the published cases relating to the issue are from the district courts, and nearly all

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[4] In at least one instance, the burden of proof to establish managing-agent status has been placed on the party seeking discovery. *See Proseus v. Anchor Line, Ltd.*, 26 F.R.D. 165, 167 (S.D.N.Y. 1960). Since the ultimate decision whether a deposition qualifies as a statement by a managing agent must be made by the trial court in applying Fed. R. Civ. P. 32(a)(2), courts in pretrial proceedings have resolved doubts under the standard in favor of the examining party. *See Atlantic Coast Insulating Co. v. United States*, 34 F.R.D. 450 (E.D.N.Y. 1964); *United States v. The Dorothy McAllister*, 24 F.R.D. 316, 318 (S.D.N.Y. 1959); *Rubin v. General Tire & Rubber Co.*, 18 F.R.D. 51, 56 (S.D.N.Y. 1955); *Curry v. States Marine Corp.*, 16 F.R.D. 376, 377 (S.D.N.Y. 1954); 4A J. Moore, *supra*, at ¶ 30.55(1); C. Wright, A. Miller & E. Cooper, *supra*, § 2103, at 376.

of those decisions concern whether an employee of a corporation should be designated a managing agent. 4A J. Moore, *supra*, ¶ 30.55, at 30-72 n.15. Only rarely have courts even had occasion to examine whether a *de facto* relationship with a corporation, rather than a *de jure* one, furnishes a basis in law for designating a managing agent. *See, e.g., Petition of Manor Investment Co., supra; Independent Producers Corp. v. Loew's, Inc.*, 24 F.R.D. 19 (S.D.N.Y. 1959).

In the *Manor Investment* case, the individual designated as a managing agent was not shown to hold any office or formal position in the corporation. He did, however, control its affairs, performing functions "of a supervisory nature" related to the activities in question. More generally, the individual exercised "supreme" authority within the corporation. *Id.* at 301. In addition to having practical control of the firm's destiny, the individual owned all the stock in the enterprise. In concluding that the individual was indeed a "managing agent" of the enterprise, Judge Weinfeld found "such unity of interest between [the company] and [the owner], that it may be referred to as his 'alter ego.'" *Id.* The learned judge thus drew on the familiar doctrine of law permitting courts, where the result would otherwise be unjust or inequitable, to pierce the corporate veil, a veil that ordinarily shields investors from liability for contractual obligations or tortious acts by the corporation and that protects the corporation from being bound by the independent acts of investors. *See Labadie Coal Co. v. Black*, 672 F.2d 92, 96-100 (D.C. Cir. 1982). *See generally* Wormser, *The Disregard of the Corporate Fiction and Allied Corporate Problems* (1927); Hamilton,

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[5] "[T]he fiction of corporate entity may be and should be disregarded in the interests of and to promote justice in such cases as fraud, violation of law or contract, public wrong, or to work out the equities among members of the corporation internally and not involving rights of the public or third

The Corporate Entity, 49 Tex. L. Rev. 979 (1971); Berle, *The Theory of the Enterprise Entity*, 47 Colum. L. Rev. 342-43 (1947); Latty, *Disregarding the Corporate Entity as a Solvent of Legal Problems*, 34 Mich. L. Rev. 597 (1936). Under the alter ego theory, the court may ignore the existence of the corporate form whenever an individual so dominates an organization "as in reality to negate its separate personality." *Quinn v. Butz*, 510 F.2d 743, 758 (D.C. Cir. 1975). The test is a practical one, focusing on how active and substantial the individual's control is. *Valley Finance, Inc. v. United States*, 629 F.2d 162, 172 (D.C. Cir. 1980).

For the purpose of determining whether an individual is a "managing agent" within the meaning of the discovery rules, the alter ego theory provides a useful analogy. As in the arena of corporate liability, the focus begins with the character of the individual's control. In addition, we can profitably examine both the degree to which the interests of the individual and the corporation converge, and how helpful the individual will be in fact-finding on the matter at issue, in comparison to others associated with the corporation. As in all matters appertaining to discovery, it is the ends of justice that are to be served. *See* Fed. R. Civ. P. 1 (the Federal Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action").

C

L. Ron Hubbard resigned from his official position as Executive Director of Scientology Churches in 1966, after serving for more than a decade. He continued thereafter in the ostensibly nominal position of "Founder." The Government offered abundant evidence in the District Court, however, that Hubbard played a uniquely promi-

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persons." *Fletcher Cyclopedia Corporations* § 25, at 305; *see also* W. Cary & M.E. Eisenberg, *Cases and Materials on Corporations* 80-103 (5th ed. 1980).

nent role within Scientology and various affiliated organizations from 1966 until the early 1980's. As founder of Scientology and the sole source of its scriptures, Hubbard enjoyed authority difficult for the founder and owner of a garden-variety private business to attain. Private, secular concerns may advance beyond the vision of its founder; new talents may need to be secured as the cycles of the organization's development unfold. It is not at all an unfamiliar situation for the entrepreneur—the visionary—to find inhospitable the administration of the vast enterprise spawned by his experimentation in the laboratory or workshop. But an organization claiming to be a religion that is built upon the word of a single individual venerated by the flock of the faithful is, it scarcely needs to be said, a rather different sort of entity. It is not disputed that, in the spiritual or ecclesiastical matters asserted to be the high mission of Scientology organizations, the word of L. Ron Hubbard has remained unquestioned.

From evidence adduced below, Hubbard appears to have maintained control in administrative matters through high positions in such entities as the Sea Organization, "an elite fraternity of Scientologists." *Church of Scientology of California v. Comm'r*, 83 T.C. 381, 389 (1984).[6] Indeed, uncontested declarations before the District Court

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[6] The Tax Court found that although Hubbard had officially resigned from his position as Executive Director of Scientology in 1966, he remained in the "top position." Through the Hubbard Communications Office Policy Letters, he controlled the basic administrative policy of the California Church, the "Mother Church" of all Churches of Scientology in the United States, 81 T.C. at 389, 401. Through various types of policy directives, including "Flag Orders," "L. Ron Hubbard Executive Directives," and "Orders of the Day," Hubbard directed operations in Scientology's subsidiary organizations. *Id.* at 389.

Hubbard also retained control over Scientology's financial affairs. He was a signatory on all Scientology bank accounts. His approval was required for all financial planning. He was

leave little doubt about either the ecclesiastical or administrative dimensions of Hubbard's authority during the period from 1966 to 1982. The declarations of Diana Sue Reisdor-Voegeding and John Nelson, associates of Hubbard until 1982, describe the mechanisms by which Hubbard controlled operations of Scientology and its related organizations, passed on orders to subordinates, and sought to avoid prosecution for his ties to the Church. J.A. at 395-403. Beyond these declarations specifically cited by the District Court (J.A. at 429), the Government submitted other declarations bearing on the question of Hubbard's control. Laurel Sullivan, an officer in the Scientology organizations from 1973 to 1981, asserted that public pronouncements to the effect that Hubbard had at that time disassociated himself from the Scientology organizations were "completely untrue," and that he in fact issued orders that were immediately obeyed. J.A. at 208. Kima Douglas, who worked at the Church from 1968 through 1980, declared that Hubbard exercised "complete control over the entire (Church) organization." J.A. at 216. Gerald Armstrong, another associate, told of a 1980 meeting to make plans to conceal Hubbard's acknowledged control over "all aspects of" the Church of Scientology of California. J.A. at 222. The Tax Court decision to which we just alluded, in denying the California Church of Scientology tax-exempt status for the years 1970, 1971 and 1972, set forth detailed findings about Hubbard's relation to that organization along with the numerous other Scientology organizations. *Church*

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the sole trustee of a major Scientology fund. He controlled Operation Transport Corp., Ltd., a sham corporation which purportedly performed banking services for "Flag," Scientology's administrative center. *Id.* at 389, 399, 400.

Further, Hubbard supervised "auditing," the process through which Scientologists help an individual gain "spiritual competence." He also continued to develop Scientology doctrine, *id.* at 385, 389, as our subsequent discussion in the text will show.

of Scientology v. Comm'r, supra. The Tax Court harbored no doubt that Hubbard "kept control over" the policies, actions, and even the finances of the California Church. *Id.* at 389;[7] *see also* n.6, *supra.*

Beyond the overall dominance that he exercised over the Scientology organizations during this earlier period, Hubbard was closely linked to, if not in charge of, the activities for which appellees initially sought his deposition. The primary evidence about these activities emerges from the criminal prosecution in which seven members of the church, including Hubbard's wife, were found guilty of conspiracy to obstruct justice. In that trial, one defendant was found guilty of conspiring illegally to obtain government documents, and another was found guilty of theft of government property. *See United States v. Hubbard,* 650 F.2d 293, 301 (D.C. Cir. 1980). In a Stipulation of Evidence submitted in that case, the defendants recounted a full-fledged campaign mounted by the Church of Scientology and its affiliated organizations against the United States Government, particularly the Internal Revenue Service. *See* Stipulation of Evidence, *supra.* The conspiracy, involving all levels of the Church hierarchy, encompassed theft of government documents for use in litigation against the United States, falsification of government identification cards, wiretapping, infiltration and perjury. *See id.* The Stipulation indicated that Hubbard "was, by virtue of his role as the founder and leader of Scientology, overall supervisor of the Guardian's Office," a Scientology entity which carried out

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[7] To be sure, the findings by various courts which have found themselves immersed in Scientology-related litigation have not been entirely uniform in this respect. *See Church of Scientology of California & Founding Churches of Scientology of Washington, D.C. v. Siegelman,* No. 79 Civ. 1166 (S.D.N.Y. order dated Oct. 27, 1980) ("absence of any official connection" to Churches on the basis of evidence before the court prohibits compulsion of Hubbard as a witness), J.A. at 271-73.

these illicit activities. *Id.* at 7. Indeed, the grand jury named Hubbard as an unindicted co-conspirator in that case. Those indicted and convicted included not only Hubbard's wife, who "as the second person in the hierarchy of Scientology, had duties which included supervision of the Guardian's Office," *id.* at 8, but several other officials occupying high posts in the Scientology hierarchy.

The criminal case does not stand alone. The Tax Court decision to which we previously referred denied the Church tax exempt status in part because of this conspiracy by the Scientology organizations, "beginning in 1969 and continuing at least until July 7, 1977." *Church of Scientology of California v. Comm'r, supra,* 83 T.C. at 505. Finding that the Church of Scientology of California "filed false tax returns, burglarized IRS offices, stole IRS documents, and harassed, delayed, and obstructed IRS agents who tried to audit the Church's records," *id.*, the Tax Court held that the California Church had violated public policy and thereby lost entitlement to any exemption which it might otherwise have enjoyed. 83 T.C. at 506-09.

Abundant evidence supports the proposition that Hubbard continued in his *de facto* position as head of the Church.[8] Based on the evidence in the record, the Dis-

[8] We observe that other courts have reached inconsistent results in related cases concerning the managing-agent status of Hubbard in more recent years. Three decisions, relying on many of the same declarations and documentary evidence presented in this case, found that Hubbard could be deposed as a managing agent. *Church of Scientology of California v. Armstrong,* No. C420153 (Cal. Super. Ct. July 20, 1984), J.A. at 165-93; *Church of Scientology of California v. Flynn,* No. CV 83-5052R (C.D. Cal. Mar. 20, 1985) (finding Hubbard a managing agent through March 4, 1985), Supplemental Appendix ("S.A.") at 729-30; *Church of Scientology Int'l v. Elmira Mission of the Church of Scientology,* No. CV 85-412T (W.D.N.Y. order dated Nov. 26, 1985), J.A. at 732-49. A fourth court, upholding the finding of a United States Magistrate, concluded that Hubbard could not be considered a man-

trict Court rightly concluded that Hubbard was in a position to provide information about the conspiracy on behalf of the Scientology organizations for this purpose.

D

To designate Hubbard as, at least prima facie, a managing agent, the District Court had to find it probable that he remained a managing agent for the Scientology organizations at the time his deposition was sought. Fed. R. Civ. P. 32(a)(2). 4A J. Moore, *supra*, ¶ 32.04. For the first scheduled deposition, Hubbard must have been, prima facie, managing agent as of November 1984; for the second, as of April 1985. Faced with overwhelming evidence of Hubbard's continuing control over Scientology as of 1982, appellants have sought to raise doubt whether Hubbard remained as managing agent after that time and specifically at the critical, later dates of the aborted depositions. First, they emphasize that the declarants upon whose statements the Government relies held no positions in Scientology organizations after 1982. Second, Scientology submitted numerous statements by its high officials to the effect that Hubbard had engaged in communications with Scientology's official organs only intermittently since 1982 and that he had not communicated with the Scientology apparatus since May 1984. *See, e.g.*, Declaration of Marc Yager, J.A. at 437-39; Declaration of Guillaume Lesevre, J.A. at 446-47. Third, Scientology points to indications of organizational rearrangements around 1981-82, when Hubbard hired a law firm and a professional management agency separate from the Scientology network to handle his personal affairs. *See* Declaration of Lyman Spurlock, J.A. at 457-58; Declaration of Lawrence E. Heller, J.A. at 461-64.

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aging agent for purposes of Fed. R. Civ. P. 30 after December 9, 1983. *Religious Technology Center v. Scott*, No. CV 85-711-MRP (C.D. Cal. order dated Jan. 24, 1986), J.A. at 773-75; *see also* n.4, *supra*.

The narrow question to be explored is whether the District Court erred in holding it probable that Hubbard continued to exercise the authority of a managing agent for Scientology insofar as he retained authority to determine whether to govern authoritatively in either administrative or ecclesiastical affairs. As noted above, Hubbard's role as managing agent up to approximately 1982 is well established in the record. A "general principle" in the law of evidence in such matters is that "a *prior* or *subsequent* existence is evidential of a later or earlier one." 2 *Wigmore on Evidence* § 437, at 514 (emphasis in original).[9] In addition, the declarations of the church officials themselves, while denying Hubbard's role,[10] in fact implicitly confirmed that Hubbard, even after 1982, remained free at all relevant times to communicate to them whatever and whenever he wanted. Indeed, the two times they agree that he did communicate with the entire Scientology apparatus, in December 1983 and January 1984, Scientology dutifully issued his statements to its members,[11] exactly as if he remained in his undisputed

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[9] We recognize that a presumption of continuity in time may not hold as an absolute rule for relations of authority, see 9 *Wigmore on Evidence* § 2530 (Chadbourn ed. 1981). "[T]he rulings merely declare that certain facts are admissible, or that they are sufficient evidence for the jury's finding . . . on such issues. . . ." *Id.* (citations omitted).

[10] It cannot go unnoticed that these declarations were provided by individuals who owe their allegiance to an organization whose officials in the past have employed a number of devices, including deception and falsification, to achieve the organization's goals. But needless to say, we are not in a position to weigh the veracity of the numerous declarants whose statements came before the District Court.

[11] Rons Journal 38, as the later communication was known, took the form of a tape recording distributed to local Scientology Churches and Missions. *See* Transcript, transcribed December 18, 1984, J.A. at 355-93. In this message, apparently recorded on New Year's Day 1984, Hubbard reported that he was making available "the first accurate briefing I have had on scientology organizations in several years." J.A.

position of authority. Lesevre Declaration at J.A. 446; Yager Declaration at J.A. 438-39. As the District Court concluded, it appears without question that had Hubbard attempted to reassert his authority in other ways, Scientology officials would have accepted that exercise of dominion over the flock. So far as we can discern, the record reveals no evidence that Hubbard intended to end his relationship with Scientology, but only that he wanted, in his unfettered discretion, to determine whether and how to continue that relationship. Ultimate control, we have no doubt, he possessed until his death.[12]

The continued, undisputed possibility that Hubbard might unilaterally reassert his authority provided ade-

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at 356. The transcript suggests the way he continued to exercise such authority that amounted to control. He noted that he had not "[f]or a very long while . . . been connected" with the "demanding area" of "active management of the Church or associated organizations." *Id.* Yet, as the reason for this separation, Hubbard contended that he needed time to "complete my researches and write them up for you," *id.*, an apparent reference to his pursuit of refinements in Scientology doctrine. *See also* J.A. at 391-92 (announcing "new discoveries"). In the bulk of the 37-page transcript, Hubbard recounted in great detail the latest changes in the Scientology organizations, with comprehensive statistics about the state of finances, the growth of the organization, and efforts by "new executives" in the organization to "rebuild global scientology in every division and sector, get it back on policy and in tech" after an alleged attempt by "power crazy people" to take over the organization. J.A. at 357-58. In this communication, Hubbard alluded to "Rev. 352," or L.R.H. Ed. 352, J.A. at 358-59. In this statement from December 1983, Hubbard "gave an inkling" of the recent changes in the organization that Rons Journal 38 described in detail.

[12] On January 27, 1986, over nine months after dismissal of this suit in the trial court, the Church announced that L. Ron Hubbard had died on January 24, 1986. *See* J.A. at 718 (citing account in Washington *Post*). As the parties have implicitly recognized, Hubbard's passing has no bearing on the questions before us. We remain obligated to decide the appeal on the basis of the record before the District Court.

quate justification for the trial court's holding. Courts have accorded managing agent status to individuals who no longer exercised authority over the actions in question (and even to individuals who no longer held any position of authority in a corporation), so long as those individuals retained some role in the corporation or at least maintained interests consonant with rather than adverse to its interests. *See, e.g., Independent Producers Corp. v. Loew's, Inc., supra*; *Fay v. United States*, 22 F.R.D. 28, 31-32 (E.D.N.Y. 1958); *Curry v. States Marine Corp., supra*, 16 F.R.D. 568. *But see Proseus v. Anchor Lines, Ltd., supra*, 26 F.R.D. 165.

But we are satisfied that the District Court's holding in this respect rests on even stronger ground. Hubbard continued through 1984 not only as the potential leader of the Scientology organization but as the actual leader. Even as Hubbard may have sought to distance himself, for whatever reason, from administrative details and to separate his personal business affairs from the Scientology apparatus, the evidence before the District Court demonstrated that Hubbard retained preeminence as spiritual or ecclesiastical head of Scientology. The basic structure of belief for Scientology dictates that no one can replace him in this role.[13] In this essential sense, Scientology

[13] We are informed, without contradiction, that Scientologists uniformly agree that the writings of Hubbard comprise the sole source of their scriptures, a status equivalent to Judeo-Christian Scriptures. *See* Declaration of Heber Jentzsch, J.A. at 279; Yager Declaration, J.A. at 435-36; Lesevre Declaration, J.A. at 444; Church of Scientology, *Scientology: A World Religion Emerges in the Space Age* 52-55, District Court Exhibit 4(a)-A. As Rons Journal 38 suggests, Hubbard viewed even his most recent "new discoveries" as authoritative truth to be passed on as church doctrine. J.A. at 391-92. The great detail in which Hubbard recounted in Rons Journal 38 the status of the church organization and its membership also suggests that despite the declarations of Church officials, Hubbard's role after 1982 may have encompassed at least some sort of advisory authority over the organization; the communications about "dis-

remained his alter ego despite the passive role he sought to assume. In an organization which claims to derive its purpose from Hubbard's writings and sayings, the role that Hubbard continued to play in Scientology affairs could scarcely be viewed in law or in practical judgment as a figure of lesser status than that of managing agent.

E

We recognize that the District Court's definition of "managing agent" imposed a greater burden on Hubbard if he truly wished to disassociate himself from the Scientology organization that might obtain for, say, the founder of a business enterprise. Yet, Hubbard's status —as founder and spiritual leader of a movement that lays claim to the status of a religion—presents a unique situation in the application of traditional legal doctrines governing the relationship of individuals to organizations or associations with which they are or have been affiliated. While an entrepreneur might simply terminate all connections to the enterprise that he or she had founded, Hubbard's teachings catapulted him to the epicenter of Scientology attention and activity. During his lifetime, Hubbard remained an object of allegiance and veneration even if he did not maintain regular communication with the organizational vessel. Under these unusual circumstances, we have no hesitation in upholding the District Court's finding that the Government had shown, prima facie, Hubbard's status as managing agent of Scientology at the pertinent times.

III

The question remains whether the trial court properly dismissed this suit under Fed. R. Civ. P. 37(b)(2) by

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semination and delivery of Scientology religious services," Lesevre Declaration at J.A. 446; Yager Declaration at J.A. 438, which the declarants have not submitted for the record or described in detail, suggests the same.

virtue of Hubbard's failure to appear at the April 1985 deposition. As in other cases of dismissal imposed as a sanction, the applicable standard of review confines appellate inquiry to whether the District Court abused its discretion. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) (per curiam); *Aruba Bonaire Curacao Trust Co. v. C.I.R.*, 777 F.2d 38, 44 & n. 7 (D.C. Cir. 1985) (dismissing suit under "analogous" Tax Court Rule 104); *Weisberg v. Webster*, 749 F.2d 864, 870 (D.C. Cir. 1984) (dismissing suit under Rule 37); *Automated Datatron, Inc. v. Woodcock*, 659 F.2d 1168, 1169 (D.C. Cir. 1981) (dismissing counterclaim under Fed. R. Civ. P. 41(b)). That is, needless to say, a rule of appellate restraint, a principle faithful to the reality that appellate tribunals cannot hope to have the entire range of considerations as readily at hand as the court charged with the case in the first instance. We rightly pay great deference, as the abuse-of-discretion standard itself suggests, to the District Court's determination in such instances. Implicit in that governing standard is the recognition that the trial court has a better "feel," as it were, for the litigation and the remedial actions most appropriate under the circumstances presented. The Court of Appeals enters the fray only at the end of what may well be—and indeed was here—a lengthy process that moved step-by-step toward the disposition that prompts the challenge on appeal. The abuse-of-discretion standard calls on the appellate department, in a spirit of humility occasioned by not having participated in what has gone before, not just to scrutinize the conclusion but to examine with care and respect the process that led up to it.

A

The pertinent text of Rule 37 provides that when "a party or an officer, director, or managing agent of a party . . . fails . . . to appear before the officer who is to take his deposition, after being served with proper

notice . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just," including "dismissing the action or proceeding or any part thereof." Rule 37(b)(2), (b)(2)(C).

In reviewing dismissals under Fed. R. Civ. P. 37 and the closely analogous Tax Court Rule 104, we have consistently applied the rule of *Societe Internationale v. Rogers*, 357 U.S. 197, 212 (1958), requiring that the dismissal be based on "willfulness, bad faith, or . . . fault" on the part of the plaintiff. *See Aruba Bonaire Curacao Trust Co. v. C.I.R.*, *supra*, 777 F.2d at 45; *Weisberg v. Webster*, *supra*, 749 F.2d at 871. While such a finding remains a prerequisite to imposition of the dismissal sanction, it is by no means the sole consideration relevant to the determination whether to dismiss the case. As the Supreme Court has observed, a court does well to consider the deterrent effect a sanction will have on parties and potential parties in other cases who might otherwise contemplate abusive actions. *See National Hockey League*, *supra*; *see also Shea v. Donohoe Construction Co.*, No. 85-5931, slip op. at 13 (D.C. Cir. July 18, 1986); *Aruba Bonaire*, *supra*, 777 F.2d at 44; *Weisberg*, *supra*, 749 F.2d at 870-71. Especially in cases of delay to the orderly progression of the litigation process, the fundamental concern of avoiding the squandering of scarce judicial resources (and the resources of other litigants) in an era of overcrowded dockets and untoward delays in getting cases decided is highly germane to whether a District Court should dismiss a case. *See Donohoe Construction Co.*, *supra*, slip op. at 9-10; *Automated Datatron, Inc.*, *supra*, 659 F.2d 1168.

In review of past dismissals under Fed. R. Civ. P. 37 and Tax Court Rule 104, this court has had little trouble in finding the requisite bad faith or fault where the party has failed to respond to interrogatories, *see Weisberg v. Webster*, *supra*, or failed to appear at depositions without an attempt at explanation, *see Aruba Bonaire*,

supra. Here, despite the protestations of Scientology that it could not contact Hubbard, the District Court took Hubbard's absence at the April deposition to "supply the requisite 'element of willfulness or conscious disregard' for the discovery process which justifies the sanction of dismissal" (citing *Dellums v. Powell*, 566 F.2d 231, 235 (D.C. Cir. 1977)), J.A. at 475. In our view, this treatment comported with the status of managing agent that the District Court properly attributed, prima facie, to Hubbard. Since Scientology remained Hubbard's alter ego, notice to the organization could reasonably be construed as notice to him; in consequence, the Church itself, as the party for which Hubbard was, prima facie, the managing agent, could be sanctioned for his failure to appear when ample advance notice was given of the importance of the deposition and the consequence that would attach from failure to attend to it.[14]

The District Court also had ample reason to interpret the failure of Hubbard to abide by its order as evidence of "willfulness, bad faith or . . . fault." *Societe Internationale, supra*, 357 U.S. at 212. Appellees presented substantial evidence that the arrangement by which Hubbard could communicate with the Church only at his initiative was in fact designed to shield Hubbard from legal process. *See* Declaration of Gerald Armstrong, J.A. 222; Declaration of Diana Sue Reisdorf-Voegeding, J.A. 396-98; Declaration of John Nelson, J.A. 202-03; *see also* documents at J.A. 22, 32-36, 237-40. Coupled with representations by Church officials about their inability to con-

[14] We are thus not confronted with a sudden or precipitous action by the District Court, but to the contrary a carefully calibrated course of action designed to further the progress of prolonged litigation. Nor are we faced with a situation where an innocent client may have suffered by virtue of the actions or omissions of an attorney. *See, e.g., Shea v. Donohoe Constr. Co., supra; Butler v. Pearson*, 636 F.2d 526 (D.C. Cir. 1980); *Jackson v. Washington Monthly Co.*, 569 F.2d 119 (D.C. Cir. 1977).

tact Hubbard, this evidence could reasonably be interpreted by the District Court as indicating that Hubbard and the Church had structured their relationship to frustrate the orderly process of discovery proceedings.

B

Dismissal, as we have had occasion to note, is "an extremely harsh sanction." *Trakas v. Quality Brands, Inc.*, 759 F.2d 185, 186 (D.C. Cir. 1985). Dismissal before trial is, in many circumstances, "to be taken only after unfruitful resort to lesser sanctions." *Jackson v. Washington Monthly Co.*, 569 F.2d 119, 123 (D.C. Cir. 1977). The District Court nonetheless enjoys authority to impose this sanction even where "a less drastic sanction might have been entertained," *Automated Datatron, Inc.*, *supra*, 659 F.2d at 1169. But in our view, it is unnecessary to embark upon a lengthy inquiry into possible alternative sanctions under the circumstances here. No monetary or other sanction imposed on Scientology held out any realistic promise of overcoming the barrier Hubbard had chosen to erect between himself and the Church. Nor would dismissal of a part of the suit or of the pleadings suffice. The conspiracy the appellees alleged goes beyond the "unclean hands" defense as initially advanced in the District Court; rather, the far-reaching conspiracy as alleged by the Government goes to the very essence of this lawsuit, providing, if true, the basis for law enforcement activities that Scientology has attacked as illegal.[15] *See* n.3, *supra*.

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[15] Prior resort to lesser remedies is not in any event required regardless of the circumstances presented. Here, a clear order of the court was issued only after the party seeking discovery had been put to the test of demonstrating a need for the deposition. We emphasize the importance in our review of the care and deliberativeness evidenced by the District Court in moving to invoke a sanction, expressly authorized by the Rules, only after a crystal clear warning of the sanction to be imposed had been provided.

To be sure, had defendants been able to secure the information they sought from a source other than Hubbard, the sanction of dismissal would have been less clearly appropriate. But that condition did not obtain here. Based upon the record before us, we agree with the District Court's conclusion that Hubbard himself was "uniquely situated to provide information" relevant to the actions of Scientology against the Government. J.A. at 475. We do well to remember that for most of the era—in the period up to 1978—with which this lawsuit is concerned, there can be no reasonable doubt that Hubbard was Scientology's managing agent. So long as this was the case, Hubbard was the one individual likely to be best informed about the role that the conspiracy (as chronicled in the documents from *United States v. Mary Sue Hubbard*) played in the Scientology organization. Under those circumstances, his deposition was of critical importance. His failure to comply with a clear directive of the District Court, an order accompanied by an express threat of dismissal, warranted the sanction imposed by the District Judge in the exercise of her sound discretion.

Affirmed.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5885

September Term, 1986
CA No. 78-00107

Founding Church of Scientology of Washington, D.C., Inc., *et al.*,
Appellants,
v.

William H. Webster, Director, Federal Bureau of Investigation of the United States, *et al.*

FILED
DEC 30, 1986
GEORGE A. FISHER
CLERK

BEFORE: RUTH B. GINSBURG, STARR and SILBERMAN, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK
BY: /s/ Robert A. Bonner
Chief Deputy Clerk

United States Court of Appeals

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CLERK

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D. H. Ginsburg, Circuit Judges

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ORDER

Appellants' suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that appellants' suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK
BY: /s/ Robert A. Bonner
Chief Deputy Clerk